IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77 - 1624

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE,
Petitioner,

v.

SEACOAST ANTI-POLLUTION LEAGUE and
AUDUBON SOCIETY OF NEW HAMPSHIRE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly find that permit proceedings required under Sections 316(a) and

402(a)(1) of the Federal Water Pollution Control Act were subject to Sections 554, 556 and 557 of the Administrative Procedure Act?

2. Did the Court of Appeals correctly find that the EPA Administrator had improperly supplemented the record during the appeal?

STATEMENT OF THE CASE

On August 1, 1974, Petitioner, Public Service Company of New Hampshire ("PSCO") applied to the United States Environmental Protection Agency ("EPA") Region I for a permit under 33 U.S.C. §§1326(a), 1326(b), and 1342, §§ 316(a), 316(b), and 402 of the Federal Water Pollution Control Act ("FWPCA") , 33 U.S.C. §§ 1251 et seq., to discharge heated water, a pollutant, into New Hampshire's coastal waters. The permits required under §402, the National Pollutant Discharge Elimination System ("NPDES") permits, are the cornerstone of the FWPCA's strategy to meet the "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985". 33 U.S.C. § 1251(a)(1).

As part of the permit procedures, the EPA was asked to approve a "once through" cooling system for a large nuclear plant PSCO proposed to build in Seabrook,

New Hampshire. A "once through" cooling system, as the name indicates, uses water needed to cool the condensers in the power generation system only once without recycling it, and therefore requires very large quantities of water – in this case, approximately 1.2 billion gallons per day. The water, having been used to pick up waste heat from the condensers, is then discharged back into the estuary at an elevated temperature. In this case it is estimated that the average discharge temperature will be 39° F higher than the ambient water temperature. Because of the once through nature of the cooling system, PSCO applied under § 316(a) for a less stringent effluent limitation than would otherwise apply.

Pursuant to an agreement entered into between the Nuclear Regulatory Commission and the EPA (Proposed Second Memorandum of Understanding Regarding Implementation of Certain AEC Responsibilities, 39 Fed. Reg. 39491), the Regional Administrator agreed to PSCO's request for early determinations on the proposed cooling system. After having made certain favorable preliminary determinations on the proposed system in 1975, former EPA Regional Administrator McGlennon granted the Respondents', Seacoast Anti-Pollution League and

Audubon Society of New Hampshire ("SAPL/Audubon"), motion for an adjudicatory hearing on the permit application, as provided by EPA regulations. 40 C.F.R. §125.36. A full adjudicatory hearing before an Administrative Law Judge was held in March, 1976. At that hearing the Respondents presented detailed evidence concerning the impact of the proposed cooling system on the marine biota which has continued to be the factual basis of their arguments before both the EPA and the courts.

In July, 1976, while Mr. McGlennon's decision was pending, Petitioner commenced construction of the proposed nuclear plant, pursuant to an "Initial Decision" rendered by a Nuclear Regulatory Commission ("NRC") Atomic Safety and Licensing Board as to those issues within the NRC's competence.[1/] Public Service Company of New Hampshire (Seabrook Units 1 & 2), LBP-76-23, 3 N.R.C. 857 (1976).

On November 9, 1976, EPA Regional Administrator McGlennon issued a lengthy decision

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[1] Petitioner states that the NRC Licensing Board also approved the once through cooling system. Petitioner's Brief at 3,5. This is true but misleading, because the NRC Commissioners, on review of this issue, decided to rely wholly on EPA's decision on the cooling system, and not to give effect to its own Licensing Board's decision approving the cooling system.

revoking his earlier determination because he found that the proposed cooling system did not meet the requirements of §§ 316(a) and 316(b) of the FWPCA.[2/] An appeal by Petitioner to the EPA National Administrator, now Douglas M. Costle, followed. Prior to his reversal of Regional Administrator McGlennon's decision in June, 1977, and after the close of the hearings, the Administrator solicited affidavits from Petitioner's consultants and convened a panel of EPA experts.

Although timely objection to the affidavits was made by SAPL/Audubon, no objection to the evidentiary contributions of the technical panel was ever made because none of its members had appeared as witnesses, and their participation was not acknowledged before the Administrator's decision was announced. However, the EPA Administrator relied on these post-hearing submissions in reaching his decision vacating that of the Regional Administrator. App. 24.

SAPL/Audubon then appealed the Administrator's decision to the United States Court of Appeals for the

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[2] Mr. McGlennon's November 9, 1976 decision is not appended to the petition.

First Circuit which in a careful decision vacated the decision of EPA Administrator Costle. The Court of Appeals found that Mr. Costle's decision was based on matters of material importance which were not part of the record compiled at the adjudicatory hearing. It held that the decision must therefore be vacated and remanded to the Administrator for further action. In its remand order the Court of Appeals suggested various options with respect to future EPA action, including the possibility that the Administrator make his decision without further hearings on the basis of the record before him. App. 19. The Administrator has subsequently decided to hold further adjudicatory hearings in June, 1978 in order to supplement the record.

ARGUMENT

I. THE QUESTIONS OF LAW UPON WHICH THE PETITIONER RELIES DO NOT JUSTIFY THE ISSUANCE OF A WRIT OF CERTIORARI.

The Petitioner relies primarily on one question of law to justify the granting of its petition for a writ of certiorari. This is the determination of the Court of

Appeals that the sections of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 501 et seq., governing adjudicatory proceedings apply to a permit proceeding under §§ 316(a) and 402(a)(1) of the FWPCA. Respondents submit that the Petitioner's argument on this question of law does not justify the exercise of this Court's discretion to issue a writ of certiorari. Respondents believe that the Court of Appeals decided the issue correctly, that its decision is consistent with the decisions of the other two Courts of Appeals which have reached this question and that its decision follows closely the rules and standards set forth in this Court's decisions regarding the application of the APA to agency proceedings.

Petitioner argues that § 5(a) of the APA, 5 U.S.C. § 554(a), which governs the conduct of an agency adjudicatory proceeding, applies only if the statute pursuant to which the adjudication is held specifies that the proceeding be a "hearing" which is "on the record." Petitioner's Brief at 11. Petitioners further argue that since §§ 316(a) and 402(a)(1) of the FWPCA require only that the license be granted or not granted after a "public hearing", § 554 of the APA does not apply. Thus, the terms "on the record" are in Petitioner's view absolutely required in the agency's

enabling statute before an adjudication pursuant to it becomes subject to § 554 of the APA.[3/]

Petitioner cites no direct authority to support its argument. Instead it cites the well-known APA rulemaking cases of United States v. Florida East Coast Ry., 410 U.S. 224 (1973), and United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972). These cases hold that §553 of the APA does not require the further application of §§ 556 and 557 in the context of rulemaking under the Interstate Commerce Act. Florida East Coast Railway, 410 U.S. at 227-28; Allegheny-Ludlum, 406 U.S. at 757-58. Recognizing the distinction between rulemaking and adjudication, both decisions explicitly limit their direct applicability to the relationship between rulemaking and the APA. Florida East Coast Railway, 410 U.S. at 244-46; Allegheny-Ludlum, 406 U.S. at 756-57.

Respondents believe that, as properly read, these two rulemaking cases, even if applied as a

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[3] Petitioner's secondary argument appears to be a nonAPA argument that procedural rules should not be imposed on an agency to limit its discretion. Petitioner's Brief at 9-11. To the extent that this argument was once valid it ceased to be so after the passage of the APA in 1946 and after subsequent elaboration of the meaning of "due process of law" by

statement of policy in the context of an adjudication, still do not support Petitioner's argument. The Court's decisions in Florida East Coast Railway and Allegheny-Ludlum state that the terms "on the record" and "after hearing", as used in the APA, are not words of art, and that a determination of the applicability of the APA to rulemaking must be made in the context of each generic statute. Florida East Coast Railway, 410 U.S. at 237-38; Allegheny-Ludlum, 406 U.S. at 757. It is clear that neither decision establishes a hard and fast rule, but rather instructs other courts to make a separate determination in the context of each generic statute. Thus, Florida East Coast Railway and Allegheny-Ludlum are, contrary to the Petitioner's presentation in its brief, cases which support the careful textual and policy analysis undertaken by the Court of Appeals and reject the harsh and rigid interpretation of the APA that the

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this Court. It is thus no accident that FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940), the only adjudicatory case cited by the Petitioner to support its very general argument, was decided in 1940 before the passage of the APA. Legal developments since that time have made clear that, in the context of an adjudicatory proceeding where substantial rights are at stake, an administrative agency cannot act in the same fashion as it can in its rulemaking capacity or in its other policy making roles. See generally, K. Davis, Administrative Law Treatise, §8.05 et seq. (1958 and Supp. 1976).

Petitioner advances.[4/]

The Petitioner's interpretation of the APA is thus not in accord with the Supreme Court decisions it cites as support for its argument. Moreover, it is also in conflict with all relevant decisions of the Courts of Appeals made in the context of the FWPCA. The Petitioner's argument masks the fact that the issue of the applicability of the APA to FWPCA license proceedings has been previously passed upon by the Courts of Appeals for the Ninth and Seventh Circuits. Marathon Oil Co. v. EPA, 564 F.2d 1253 (9th Cir. 1977) and United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977). Neither of these decisions is on all fours with this case; however, in both of them a Court of Appeals analyzed and decided the narrow question upon which the Petitioner now seeks to justify the granting of a writ of certiorari. In both of them the Court of Appeals rejected the narrow and crabbed reading of the APA advanced by the Petitioner. Indeed, as the Court of Appeals for the First Circuit discusses (App. 5-6), both Marathon Oil and United States Steel find the NPDES permit process subject to the APA's procedural requirements for adjudications. Marathon

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[4] See 2 K. Davis, Administrative Law Treatise, §6.504-1 (1958 and Supp. 1976).

Oil, 564 F.2d at 1263-65; U.S. Steel, 556 F.2d at 833-35. Therefore there is presently accord and not conflict among all the Courts of Appeals which have considered this issue, and hence no justification for review by this Court.

Lastly, it must be noted that whatever the merits of the arguments advanced by the Petitioner, they do not disclose legal questions of public interest that are likely to reoccur and hence justify review by this Court.[5/] See, Rice v. Sioux City Cemetery, 344 U.S. 70, 74 (1954). Three Courts of Appeals have now considered the application of the APA to the NPDES permit process. In Marathon Oil and U.S. Steel, private applicants successfully argued for on the record determination of NPDES permits, the result also reached here below. The EPA has not sought review of any of these decisions. The decisions in these cases also adhere to the pertinent analysis in the Attorney General's Manual on the Administrative Procedure Act 40-42 (1947), a contemporaneous interpretation given weight by the courts. Vermont Yankee Nuclear Power

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[5] The Administrator himself has noted the "unique circumstances" of this case. (App. 28).

Corp. v. Natural Resources Defense Council, Inc., ____ U.S. ____ , 46 U.S.L.W. 4301, 4307-08 (April 3, 1978). Therefore, it can be assumed that the EPA will henceforth conform its procedures to the relevant portions of the APA in its determination of NPDES permits and thus will avoid any further need to litigate this particular question of law. Even if EPA procedures do not immediately change, the questions presented by the Petitioner are unlikely to require review by this Court as they have not heretofore been pressed by either the agency or the majority of NPDES applicants.

II. THE ALLEGED MISTAKE OF FACT BY THE COURT OF APPEALS UPON WHICH THE PETITIONER RELIES DOES NOT JUSTIFY THE ISSUANCE OF A WRIT OF CERTIORARI.

The Petitioner also seeks to justify the granting of a writ of certiorari on the basis that this Court should exercise its supervisory jurisdiction over all federal courts to reverse a factual judgment made by the Court of Appeals. Respondents believe that the Court of Appeals correctly analyzed and characterized the Administrator's decision in the context of applicable APA requirements. Even if, as Petitioner argues, the

Court of Appeals did err as to this facet of the case, such a mistake does not warrant review by this Court.

Once the Court of Appeals had determined that the APA applied to the EPA's adjudicatory NPDES proceeding, it had to determine whether or not the rules contained in §§ 554, 556 and 557 of the APA had been complied with by the Administrator. The Respondents argued successfully below that the EPA Administrator's decision had to be reversed because it relied on two post-hearing events – the request for information and the participation of the technical review panel which supplied information not contained in the record.

Although Petitioners cite no authority for the proposition, they argue strenuously that the Court of Appeals acted improperly when it initially looked behind and later rejected the Administrator's baid assertions that his technical panel did not supplement the record. Petitioner's Brief at 13-17. It is true that an agency's interpretation of its generic statute is to be accorded great weight by reviewing courts. United States v. American Trucking Ass'n, 310 U.S. 534, 549 (1940); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933). However, no parallel deference is due an agency's assessment of its procedural obligations or its conclusory statement that it had met these

obligations. See, Florida East Coast Railway, 410 U.S. at 236 n.6; Morgan v. United States, 298 U.S. 468, 477 (1936) ("But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion.").

This Court need not reach the issue of the Court of Appeals' finding of supplementation, however, for that finding is a factual one and therefore outside the ordinary purview of the Supreme Court's discretionary exercise of certiorari review. United States v. Johnston, 268 U.S. 220, 227 (1924). ("We do not grant a certiorari to review evidence and discuss specific facts.") The Court of Appeals determined as a fact that the record was improperly supplemented by the technical panel in at least four instances. App. 17-18. Moreover, should this Court decide to review the Court of Appeals' finding of supplementation, it will find it is well substantiated.[6/]

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[6] The Petitioner is incorrect in its assertion that the entire factual basis for the Court of Appeals' decision has turned out to be erroneous. Petitioner at 15, 16. The reference cited by the technical panel to Odum (1971) (App. p. 173) was not cited to at all in the record compiled before the Administrative Law Judge. Thus, the panel's citation to studies other than those cited to by the witnesses has contrary to Petitioner's assertions, been confirmed by the Response Prepared by the Seabrook Technical Panel to the Decision of the United States Court of Appeals for the First Circuit. App. 160-173. Moreover, as the Court of Appeals noted, the panel's error in acting as a witness encompassed far more than its use of studies not cited to before the administrative law judge. Even if looked at as a straight appeal and not in the certiorari context, the alleged mistake as to the matter of supplementation would not merit reversal for Petitioner's have not demonstrated clear or substantial error here and they have thus failed to surmount the threshold requirement for reversal of the lower court's factual determinations. United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948).

The independent inquiry by the Court of Appeals into the issue of unlawful supplementation of the record by the technical panel followed settled methods of judicial review and resulted in a factual finding. It does not in the remotest sense call for the exercise of this Court's supervisory powers.[7/]

[7/] For a discussion of what the "power of supervision" means in Sup. Ct. R. 19(b) see La Buy v. Howes Leather Co., Inc., 352 U.S. 249 (1959).

III. THE DECISION OF THE COURT OF APPEALS ACCORDS WITH RECENT SUPREME COURT DECISIONS ON ADMINISTRATIVE LAW.

Since the Court of Appeals decided Seacoast Anti-Pollution League v. Costle, No. 77-1284 (lst Cir. Feb. 15, 1978), this Court has decided Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., ___U.S.___ , 46 U.S.L.W. 4301 (April 3, 1978), a case concerning the ability of the federal judiciary to impose upon agencies procedural requirements beyond those found in their generic statutes and the Administrative Procedure Act. This Court in Vermont Yankee held that, absent a constitutional basis, the federal courts are not free to nullify agency procedures simply because of their intricacy or simplicity, as long as those procedures satisfy the minimum requirements of applicable statutes. Id. at 4308. Based on its analysis of Vermont Yankee, Petitioner has apparently concluded that the Court of Appeals should relinquish review of EPA decisions concerning Seabrook Station and cannot even require the agency to comply with the APA. Petitioner's Brief at 16-17. This position ignores essential factual distinctions between the two cases as

well as the legal compatibility of their holdings.

Vermont Yankee is principally concerned with rulemaking; Seacoast Anti-Pollution League deals solely with adjudication. Vermont Yankee pertains almost exclusively to the Atomic Energy Act of 1954; Seacoast Anti-Pollution League is concerned with the EPA's obligations under the FWPCA and, as the Administrator himself points out, "the Agency has played a very narrow role in the process of governmental approval of this plant." App. 20. Beyond these fundamental differences, the posture of agency compliance with applicable law in the respective cases is diametrically opposite. In Vermont Yankee, the Nuclear Regulatory Commission had complied with all applicable procedural standards in conducting its rulemaking proceedings. Hence, barring constitutional law considerations, there was no basis on which to impose more extensive procedural requirements. By contrast, the EPA proceedings below did not satisfy the barest minimum of procedural requirements imposed by §§ 402 and 316 of the Federal Water Pollution Control Act and §§ 554, 556 and 557 of the Administrative Procedure Act.

In an opinion that is defferential to the agency, the Court of Appeals remanded the decision to the Administrator for any further action within his power.

App. 19. In so doing, the Court left the agency " 'free to fashion [its] own rules of procedure and to pursue method of inquiry capable of permitting [it] to discharge [its] multitudinous duties.' " Vermont Yankee, 46 U.S.L.W. at 4307, quoting from FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940). In fact, the decision to hold further hearings was the agency's and not the Court of Appeals' contrary to Petitioner's assertions. Petitioner's Brief at 17. Thus, the Court of Appeals' decision, although decided prior to Vermont Yankee, is in line with the policyof judicial restraint articulated there by this Court.

Vermont Yankee reiterated this Court's historic insistence that federal courts respect the independence of federal agencies in the rulemaking context. Vermont Yankee, 46 U.S.L.W. at 4302. As such, it is relevant generally to judicial review of agency adjudications. The Respondents believe that, to the extent Vermont Yankee is relevant, it confirms the Court of Appeals' opinion in Seacoast Anti-Pollution League. The opinion is a model of deference to an agency's freedom to fashion its own procedures in light of its statutory functions. It is consistent with the decisions of the Courts of Appeals for the Seventh and Ninth Circuits, which have found that the FWPCA permit procedure is

an adjudication under the APA and, therefore, that the APA's rules on adjudication apply. App. 8-10. While the EPA is free to devise any legal method appropriate for accomplishing its administrative appellate review. It could not and cannot first announce that it will hold an adjudicatory hearing and then make a decision based on new evidence not adduced at that hearing.

The Court of Appeals required that the EPA act in accordance with the minimum procedural requirements of the APA and the FWPCA. This decision, reaffirming the minimal requirements of the FWPCA and the APA, is not only legally correct but fair. As the Court of Appeals points out, to find otherwise would be to permit the agency's staff during appellate review to make up for an applicant's or the intervenor's failure to do its job. App. 16. The Court of Appeals' decision is entirely consistent with both the specific holding and with the general policy articulated by this Court in Vermont Yankee.

CONCLUSION

The Petitioners have not demonstrated that the limited and exceptional conditions warranting the exercise of this Court's discretion to issue a writ of certiorari exist here. The Court of Appeals in a case

involving "unique circumstances "and temporary agency procedures, held that the EPA must apply the minimum procedural requirements dictated by the Federal Water Pollution Control Act and the Administrative Procedure Act. As such, the Court of Appeals' decision conforms not only with the then prevailing standards of federal law but also with more recently decided Supreme Court cases. It is in keeping with the law of other Circuits which have reached this issue and raises no new questions of law which are appropriate for certiorari review or which are likely to reoccur. Therefore, the sound exercise of judicial discretion does not merit the granting of a writ of certiorari to review the judgment and opinion of the Court of Appeals for the First Circuit entered in this proceeding on February 15, 1978.

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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